#MeToo, Now What? — Addressing Workplace Harassment in the Legal Profession and Beyond

by Ally Coll and Scott Westfahl

Drawn from our experiences, this article provides key takeaways and practical advice to professional development leaders working to address sexual harassment throughout the legal profession.

In October 2017, more than 12 million people shared their experiences with sexual misconduct using the #MeToo hashtag, sparking a viral global movement. But the #MeToo movement didn’t just reveal the extent of workplace harassment — it also demonstrated that existing policies and practices have failed to root out the problem in almost every industry.

The legal profession is no exception. In 2018, the International Bar Association (IBA) conducted the largest-ever global survey on harassment in the profession, reaching nearly 7,000 people in 135 countries. As the report issued earlier this year explains, the results provide “empirical confirmation that bullying and sexual harassment are rife in the legal profession,” with approximately one in three female respondents and one in fourteen male respondents reporting being sexually harassed in a workplace context.

The IBA survey also confirms that existing approaches have largely been ineffective at addressing the problem. In North America, approximately 79% of workplaces have anti-harassment policies in place, while 45% provide sexual harassment training to their employees — yet respondents at workplaces with policies and trainings were just as likely to be sexually harassed as those at workplaces without such practices in place.

Numbers and statistics like these can be numbing. To understand the shattering human cost they represent, one has to actually hear the horrific, almost endless stories of life and career-altering experiences with sexual harassment that brave women and some men are now sharing more openly than ever before. One of us, Scott, heard such stories and directly observed his female peers being harassed when he practiced law in the 1990s. He responded by researching and drafting a new sexual harassment policy for his large law firm, hoping that a new policy and related training would make a difference.

Two decades later the other of us, Ally, who has personally experienced workplace sexual harassment, resigned from the large law firm representing Harvey Weinstein in order to launch the Purple Campaign, a nonprofit effort to find new, more effective approaches to preventing sexual harassment in the workplace. Our paths first crossed with Ally’s January 25, 2018, Washington Post OpEd announcing her decision to launch the Purple Campaign.

The critical question in the wake of #MeToo is what are employers supposed to do to effectively address sexual harassment? After trading thoughts and ideas, we leveraged our collective resources and networks, and in September 2018, the Purple Campaign and Harvard Law School Executive Education convened global leaders from more than 30 companies and 20 legal and policy organizations at Harvard Law School in an effort to answer this question.
Over the course of the two-day #MeToo, Now What? Workshop, participants developed policy reforms to prevent workplace harassment, addressing six key topics:

• Creating effective training programs;
• Breaking down barriers to reporting;
• Establishing fair investigation and adjudication procedures;
• Leveraging existing diversity efforts and addressing intersectionality;
• Exploring the business and talent-market drivers that justify significant investment in ending sexual harassment in the workplace; and
• Developing a corporate certification program to address workplace harassment across industries.

Drawn from our experiences and what we learned at the #MeToo, Now What? Workshop, this article provides key takeaways and practical advice to professional development leaders working to address sexual harassment throughout the legal profession.

1. Create Effective Training Programs

Research demonstrates that anti-harassment training improves understanding about the type of conduct that is considered harassment and is therefore unacceptable in the workplace. According to the Equal Employment Opportunity Commission’s (EEOC’s) Select Task Force on the Study of Harassment in the Workplace, trainings can increase the probability that employees will consider unwanted sexual gestures, remarks, touching, and pressure for dates to be forms of sexual harassment, as well as their understanding that unwanted behavior from all co-workers (as opposed to just supervisors) can be sexual harassment.

But the #MeToo movement demonstrated that traditional approaches to anti-harassment training have been largely ineffective at addressing the problem. These traditional compliance-oriented programs teach employees to comply with legal requirements, but are generally limited to legal definitions. As a result, they fail to address the nuanced workplace interactions that #MeToo has brought to the surface, including more minor problematic behaviors that, when left unchecked, can evolve into major ones. To be frank, these traditional programs also fail because they are usually designed and taught by employment lawyers whose main (and arguably sole) goal is organizational risk mitigation and minimum standard compliance. Neither the content nor the trainers are focused on helping people to build an inclusive and thriving organizational culture based on mutual respect and celebration of difference.

Many employers are therefore re-thinking their traditional approach to training in the #MeToo era. One example is at Airbnb, where the company’s General Counsel has developed an innovative in-person training he personally delivers live with every employee at the company. Rather than focusing on legal definitions, Airbnb’s “Intentional Integrity” training invokes the company’s unique values and clarifies its policies on related topics such as inter-office dating and alcohol use.

Incorporating bystander training is also an effective way to emphasize that all employees have a role to play when it comes to preventing workplace harassment. People who don’t consider themselves likely targets or perpetrators of misconduct often view traditional anti-harassment trainings as an irrelevant waste of time. Worse, programs that approach employees as potential perpetrators can make them feel defensive and targeted, causing backlash that has the potential to reverse the positive effects of training. By instead approaching workers as potential allies through bystander training, companies can empower employees with the tools and strategies they need to be part of the solution.

2. Break Down Barriers to Reporting

Yes, #MeToo happened but that does not mean that all employees now feel comfortable speaking up about sexual misconduct. According to the IBA report, 75% of sexual harassment incidents remain unreported in the legal profession today. While the #MeToo movement has empowered some people to share
their experiences, many individuals — especially those with less institutional power — still remain hesitant about reporting their experiences with workplace harassment.

Retaliation is real, prevalent, and a major factor in why people don’t report. According to the EEOC study, 75% of people who reported incidents of workplace harassment to their employers experienced some form of retaliation. Instead of reporting problems, many people who experience harassment resort to measures such as avoiding the harasser, enduring the behavior, or downplaying the gravity of the situation before coming forward to report it to their employer.

Even where retaliation does not occur, workplace culture is often a barrier to reporting, because when reports are met with inaction, others are in turn disincentivized from reporting. The IBA survey found that 42% of people who didn’t report pointed to the fact that harassment was “endemic to the workplace” and “perceived as acceptable.” Other common barriers include the existence of power imbalances, confusion about how and when to report, a lack of confidence in internal protocols, and a fear among claimants that they won’t be believed.

Employers must take intentional steps to break down the barriers to reporting that remain a pervasive reality despite #MeToo. Many employers are establishing new channels for reporting misconduct, such as centralized hotlines that can be publicized on flyers, intranet sites, and through corporate awareness-raising campaigns. Technology companies have also emerged to offer innovative apps, artificial intelligence, and online tools for reporting harassment anonymously and confidentially, such as AllVoices, Callisto, Talk to Spot, and tEQuitable. Employers are also beginning to designate and train multiple individuals within their organization — including people outside of the human resources department — to intake reports of workplace harassment.

In addition to establishing multiple channels for reporting, employers should assess their workplace cultures to determine whether employees feel empowered to come forward with complaints. This can be done through climate surveys, focus groups, or simply by facilitating informal #MeToo discussions internally. Employers should also review their anti-retaliation policies to ensure they meet the demands of the #MeToo era, and reiterate their commitment to protecting employees from retaliation during training.

3. Establish Fair Investigation and Adjudication Procedures

According to the IBA report, 75% of sexual harassment incidents remain unreported in the legal profession today.

In addition to revealing the extent of the problem, #MeToo has revealed that many people who have come forward to report sexual misconduct have been treated unfairly during the internal investigation and adjudication processes that followed. In order to encourage employees to report problematic behavior when it occurs, employers must therefore also review their existing protocols for addressing harassment complaints.

Internal investigation and adjudication procedures must guarantee accountability — not only for the individuals who engage in harassment, but also with respect to how the organization responds when incidents do arise. This starts with ensuring the organization treats all complaints seriously and takes proportionate corrective action in response to substantiated allegations. While corrective action in each case will depend upon the gravity and circumstances of the offense, employers must commit to taking whatever steps are necessary to ensure a productive, safe, and empowering work environment.

It is also important for employers to be transparent about the fact that there are serious consequences for those who engage in harassing behavior. Some organizations now publicly acknowledge their firing of an employee for such misconduct, while others avoid naming names but announce aggregate data to their employees (e.g., twelve partners have been requested to leave the firm this past year due to inappropriate sexual harassment).
A critical component of transparency is the ending of the use of non-disclosure agreements. Since #MeToo, thirteen states have passed laws that limit or prohibit employers from requiring employees to sign non-disclosure agreements as a condition of employment or as part of a settlement agreement, while major companies like Uber have voluntarily ended the practice. Confidentiality can encourage people to come forward and allow them to move on, but placing that choice in the hands of the individual who has experienced misconduct — rather than with their employer — can go a long way toward promoting transparency and accountability in the workplace.

Fair process is essential not only as a way to protect individuals making accusations, but also to ensure that those who are accused are treated fairly. This is particularly true in light of evidence that #MeToo is causing a backlash that could have serious consequences for women in the workplace. According to a recent study conducted by Lean In, 60% of male managers report feeling uncomfortable mentoring, working one-on-one, or socializing with women at work in the #MeToo era. Establishing fair investigation and adjudication procedures can help reduce this chilling effect and ensure that #MeToo doesn’t undermine efforts to advance gender equality in the legal profession.

Employers must also carefully consider tradeoffs between short-term and long-term consequences, and balance the competing interests in both privacy and transparency. One emerging best practice is the implementation of Ombuds models — dispute resolution processes designed specifically to protect parties in cases involving a significant risk of retaliation — to address workplace harassment. While there is no one-size-fits-all solution, employers should re-evaluate existing investigation and adjudication protocols to ensure they create systems that all employees trust.

4. Leverage Existing Diversity Efforts and Address Intersectionality

As a recent Harvard Business Review article put it: “We already know how to reduce sexual harassment at work, and the answer is pretty simple: Hire and promote more women.” While many organizations have been working to promote diversity and inclusion in the workplace long before #MeToo, gender inequality remains a pervasive problem, especially in the legal profession. Despite the fact that women have been approximately half of law school graduates for the past 20 years, among major law firms only 22.7% of partners are women, compared with 77.3% of partners being men.

According to the EEOC, sexual harassment is more likely to occur in workplaces that have predominantly male employees, and homogeneous workplaces are generally more vulnerable to all forms of harassment. This is explained by the fact that employees who are in the “minority” in a workplace often feel isolated and more susceptible to pressure from others, while employees in the “majority” can feel threatened by those they perceive as “other.” A lack of diversity in leadership is especially problematic, and is one of the leading risk factors for harassment within an organization.

Any comprehensive solution must therefore also address the intersectionality of workplace harassment. Women of color make up just 2.5% of equity partners and 4.5% of non-equity partners in the legal profession, and are overrepresented in departures from major law firms. Openly LGBTQ+ individuals and individuals with disabilities are even less represented, making up just 1.8% and 0.4% of equity partners and 1.7% and 0.4% of non-equity partners, respectively.

Of the total charges filed with the EEOC in 2017, approximately 29,000 (33.9%) alleged racial discrimination and 27,000 (31.9%) alleged discrimination on the basis of disability status — compared with 25,000 (30.4%) alleging discrimination on the basis of sex. The recommendations outlined in this article therefore can and should be leveraged to address all forms of workplace harassment, whether it occurs because of an individual’s race, religion, disability status, gender identity, sexual orientation, or sex.

Addressing intersectionality is particularly important given that women of color are not only more vulnerable to sexual
harassment, but they are also less likely to be believed when they report. As the Dean of Boston University’s Law School explains in her recent Yale Law Journal article on the topic, leaders must address #MeToo through a multidimensional lens “in order to capture the different ways that women across intersectional categories may experience any particular event or events.”

5. Understand the Business and Talent Cases for Addressing #MeToo

The market for talent has never been as global or transparent as it is today, and creating a harassment-free workplace will help employers attract and retain top talent. The IBA survey found that 37% of respondents who reported being sexually harassed at work have either left or are considering leaving their workplaces. Research also demonstrates that the respectful treatment of employees at all levels is the top contributor to employee job satisfaction, and that workplace harassment decreases organizational commitment, even among those who don’t personally experience it.

Workplace harassment is also increasingly being seen as a competitive business issue, not just a legal and human resources one. The mishandling of sexual harassment complaints can shape public perceptions of companies as unfair and inequitable. As the #DeleteUber campaign highlighted, 57% of consumers will now boycott or seek out a certain brand because of its position on a social issue — including, in the #MeToo era, workplace harassment. Given that women drive 70 to 80% of consumer purchasing in the United States — and that 81% of women have experienced sexual harassment at some point in their lives — this issue is top-of-mind for business leaders. As clients increasingly pressure firms to focus on diversity issues, it should be for law firms as well.

As the EEOC study explains, any effective anti-harassment program “must start with and involve the highest level of management” of the organization. In order to gain buy-in from leadership and other key stakeholders, professional development leaders advocating for change within their organizations should seek to understand and communicate the business and talent cases for addressing workplace harassment.

6. Developing a Corporate Certification Program to Address Harassment

Corporate certification programs have been effectively used in the past to change norms, policies, and systems by establishing a clear set of shared expectations. In 1998, the U.S. Green Building Council began developing a Leadership in Energy and Environmental Design (LEED) certification to standardize practices around building sustainable and environmentally responsible buildings. Today, it is the most widely used green building rating system in the world, providing third-party verification to almost every type of building project.

Similarly, in 2002 the Human Rights Campaign published its first Corporate Equality Index to benchmark and assess employment practices to protect LGBTQ+ rights. More than fifteen years later, 571 major businesses — spanning nearly every industry and geography — have earned a top score of 100% for establishing policies and practices pertinent to lesbian, gay, bisexual, transgender, and queer employees. Other initiatives such as Diversity Lab’s Mansfield Certification and Disability:IN’s Disability Equality Index have likewise been successful in encouraging companies to establish internal policies and practices that promote greater diversity and inclusion in the workplace.

The Purple Campaign is partnering with employers — including Airbnb, Amazon, Expedia, and Uber — and other key stakeholders to develop a certification program to address workplace harassment in the wake of #MeToo. The program aims to create a set of shared expectations by recognizing employers taking recommended steps to address harassment in the workplace, and creating new standards around the topics outlined in this article. More information about the Purple Campaign’s certification program — including how your organization can get involved — can be found at: www.purplecampaign.org/corporatecertification.
About the Authors

Ally Coll, President and Co-Founder of The Purple Campaign, is a lawyer and nationally recognized expert, thought leader, writer, and public speaker on the #MeToo movement and gender equality in the workplace. Her writing on legal and workplace issues has been published in the The Washington Post, PBS NewsHour, the Harvard Journal on Legislation, The Hill, and Jezebel.

Ally received her law degree magna cum laude from Harvard Law School in 2016, where she served on the Board of the Harvard Women’s Law Association and as the Executive Policy Editor of the Harvard Law and Policy Review. She was a 2018 alumni recipient of the Harvard Women’s Law Association’s “Shatter the Ceiling” award. She recently served as a consultant for the 2018 major motion picture On the Basis of Sex, a biopic film about Supreme Court Justice Ruth Bader Ginsburg’s early legal career and her efforts to found the Women’s Rights Project at the ACLU.

After graduation, Ally, who had worked in Congress and in electoral politics before law school, joined the legal department of Hillary Clinton’s presidential campaign in the Brooklyn headquarters as the campaign’s Deputy Voter Protection Director. After the election, she worked as Elections Counsel on the U.S. House Administration Committee before joining the law firm Boies Schiller Flexner LLP as a litigation associate in April 2017. Ally had been working at Boies Schiller for about six months when The New Yorker revealed that the firm had retained Israeli intelligence operatives to spy on the women coming forward with their stories about Hollywood mogul Harvey Weinstein. Ally — who had just shared her own #MeToo story in The Washington Post a week earlier — took on a leadership role internally to advocate for specific steps the firm should take in response. A few months later, she left Boies Schiller to launch the Purple Campaign, writing about her decision in an OpEd in The Washington Post on January 25, 2018 titled “Why I left my corporate legal job to work full-time on #MeToo.”

Professor Scott Westfahl is the Director of HLS Executive Education and also teaches courses on leadership, teams, design thinking, and innovation within the law school’s J.D. curriculum. As the Director of the Executive Education program, he leads the HLS effort to support and develop lawyers across the arc of their careers, particularly as they advance to new levels of leadership and responsibility. He oversees and teaches in Executive Education’s core, global leadership programs for law firm managing partners, emerging law firm leaders, law firm associates, and general counsel. He also collaborates with HLS colleagues and other Harvard faculty to design and teach custom programs for law firms, law departments, and other legal-related organizations. He focuses his Executive Education teaching and writing on leadership, motivation and development of professionals, innovation, and organizational alignment from a talent management and diversity and inclusion perspective. To support diversity and inclusion in the legal profession, Scott is an advisor to the Leadership Council on Legal Diversity and hosts the LCLD’s annual Leadership Summit for managing partners and general counsel. He also serves on the Advisory Board of the Purple Campaign, the leading nonprofit organization dedicated to eradicating sexual harassment from the workplace.

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